



The Director
Legislation, Policy and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2001

Submitted by email: lpd.enquiries@agd.nsw.gov.au

31st January 2011

NEW SOUTH WALES
REGISTERED OFFICE
GREATER NEW SOUTH
WALES BRANCH
ABN 70 662 384 762
16-20 GOOD STREET
GRANVILLE NSW 2142
PO BOX 20
GRANVILLE NSW 2142
PHONE: (02) 9897 3644
FAX: (02) 9897 1481
HOTLINE: 1300 763 223
info@awu-nsw.asn.au
www.awu-nsw.asn.au
RUSS COLLISON
State Secretary
Branch Secretary

Dear Director,

Re: Submission to the Review of the *Workplace Surveillance Act 2005*

This submission is supplied by the Australian Workers' Union, New South Wales Branch (AWU NSW). The AWU NSW is a broad based union covering workers from the services sector, manufacturing, rural, mining and civil construction. With such a diversification in job classification we have a good understanding of the impact these changes will have across various workplaces.

The AWU is willing to appear before any inquiry that may be held.

Please contact me if you require any further information.

Yours sincerely,

Russ Collison
AWU NSW Secretary

PROUD OF THE PAST
FIGHTING FOR
THE FUTURE

Submission

To review

Workplace Surveillance Act 2005

By

NSW Department of Justice and Attorney general

Submitter: Mr Russ Collison, AWU NSW State Secretary

Organisation: The Australian Workers' Union, New South Wales

Address: 16-20 Good Street, Granville, New South Wales, 2142

Phone: 02 9897 3644

Fax: 02 9897 1481

Email: rcollison@awu-nsw.asn.au

AWU Submission on the Review of Workplace Surveillance Act (NSW) 2005

This report from The Australian Workers' Union, New South Wales Branch, is a submission on the review of the NSW *Workplace Surveillance Act 2005*.

The NSW *Workplace Surveillance Act 2005* (WSA) has important implications on the morale and ability of works to effectively perform their duties without the fear and uncertainty of who and when someone maybe monitoring them. The WSA must be clear, transparent and have a workable methodology that can be applied to any workplace. This would reduce stress in the workplace and allow employees and employers to have a productive and harmonious workplace.

The WSA offers a progressive step forward in acknowledging that surveillance in the workplace is a serious and important matter. The WSA offers a comprehensive coverage on how to deal with covert surveillance. The WSA unfortunately has a loose set of criteria on how to handle overt surveillance which allows employers to exploit the employer/employee relationship and tailor the surveillance to suit their needs without due consideration to employees.

This submission from the AWU outlines improvements and issues for consideration for the WSA so as to bring fairness and balance to in the workplace.

The following is a summary of the recommendations that AWU believes ought to be considered for the WSA:

1. The use of overt surveillance is to be limited to:
 - a. unlawful and/or
 - b. criminal practices and/or
 - c. protection of assets (in case of theft or missing)and not to be used for assessing employees performance including related disciplinary procedure or time and motion studies.
2. To modify or add to the definitions section of the WSA including:
 - a. Employee: to include labour hire employees to reflect the current definition of the employee as per s.3 employer (c) of WSA.
 - b. Electronic Surveillance: insert a definition.
 - c. Amend Surveillance Information: to include all sources of information that employer could obtain whether direct or indirect.
 - d. Amend Tracking Surveillance definition
 - e. Disciplinary proceeding: restricted to an employee involved in an unlawful or criminal action and not be used for any other purpose including, but not restricted to, performance.
3. The implantation of any overt surveillance must be conducted through a consultative process and any disputes arising to the merits, use or placement be allowed to be referred to the NSW Industrial Commission.
4. Expand the requirements of notice of surveillance required (s. 10) to include:

- a. New notice to be issued whenever a change to surveillance takes place.
 - b. Purpose of the surveillance is to be added to s10(4)
 - c. Review and reporting of surveillance outcomes is to be added to s10(4).
 - d. Amending 10(4b) to read location of surveillances devices.
 - e. Limiting to a specific maximum time period to 6 months in s.10(4e).
5. Expand the requirements for notifying people as listed in s.11(b) to include signage next to cameras wherever they are installed.
 6. Consultation to take place whenever additional cameras are to be installed or changes to the surveillance system are made.
 7. S.29(2)(d) to include registered industrial organisation representing employees for who can request surveillance records on behalf of the employee.
 8. Limiting the use of recorded surveillance by non-employer groups or associations to focus on their core issue and not to be used for employee performance or related disciplinary matter.
 9. Restricting the use of surveillance by law enforcement agencies to criminal and/or unlawful actions rather than assessing the performance of employees within the law enforcement agencies.

This reports examines the issues raised in the recommendations and provides explanation as to why the NSW *Workplace Surveillance Act* 2005 requires amendments.

1. The use of overt surveillance is to be limited to:
 - a. unlawful and/or
 - b. criminal practices and/or
 - c. protection of assets (in case of theft or missing)and not to be used for assessing employees performance including related disciplinary procedure or time and motion studies.

The creation of the NSW *Workplace Surveillance Act* (WSA) is to assist employers to protect their business interests from criminal and/or unlawful acts. The AWU does not see that this Act is to allow employers to abrogate from their managerial responsibilities in ensuring that performance and activities of employees are maintained at a reasonable and sustainable level. This managerial responsibility must not involve spying on workers through camera or other technologies.

The fundamental principle that must be enshrined into the WSA is that performance monitoring and/or other work related practices cannot be placed under surveillance.

Employers are increasingly using surveillance technology to observe and possibly reprimand employees. Employees under particular threat are those who have the audacity to question work practices, quiz managerial decisions or be active union delegates or occupational health and safety representatives. Workplace surveillance technology can be used as a form of intimidating work practice against employees.

The Australian Workers' Union (AWU) calls for clear limitations to be placed within the Act and only allow surveillance to protect employer's assets against theft, damage or other criminal related activities.

The old notion of "time and motion studies" disappeared as a managerial tool back in the 1970's. Today, employees worried about job security and job satisfaction eagerly look for opportunities for training and improvements to work practices to ensure continued economic survival and prosperity of the business they work for.

Today, best management practice to enhance performance would be for management, supervisors, union delegates and workers to work together as a partnership to ensure long term prosperity of the business. The implementation of surveillance cameras that could be used for work performance and disciplinary means will break down the trust between workers and management. This will result in reverting back to the adversarial relationship between management and workers that will not be beneficial for either party.

Employers and employer groups may argue that they cannot keep an ongoing watch on workers to ensure maximum performance. Hence they argue that it is justifiable to review video or other forms of surveillance which may result in disciplinary actions. The AWU maintains that this firstly shows lack of management competency and more importantly, workers are not machines but human beings. Each worker has different idiosyncrasies that separate them from a fellow human being. Everybody is different in shape, fitness, logic processing, skills, knowledge, health and life experiences. Accordingly, expecting employees to operate at maximum theoretical potential or at a high rate is unsustainable.

Given that all employees are different, the WSA does not have any formal measurers within it that can reduce overt surveillance of employees and how the material can be justifiably used. The only action left to employees is, if dismissed, bring proceedings for an unfair dismissal. This would place unnecessary stress on the employee and their family as well as a financial burden when terminated. The vast majority of cases brought before FairWork Australia do not result in a reinstatement. To avoid these problems occurring, the WSA need to be clear that no disciplinary action can result from the use of surveillance technology unless criminal or unlawful actions occur.

Section 22 provides a defence for employers regarding the use of covert surveillance if there are legitimate security justifications (employees must still be informed about the surveillance). Section 22 (2) deals with the use of information gathered from this surveillance "in disciplinary or legal proceedings against an employee" which have no connection "to the security of the workplace". Section 22 (2) states this evidence should be inadmissible unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence which has been obtained in this way.

We submit that this same restriction should apply in relation to section 14 of the Act. Section 14 effectively waives the notice requirements contained in section 10 if agreement is reached between an employer and an employee (or a group representing a substantial number of employees at the workplace) for surveillance to be carried out for a purpose other than the surveillance of employees.

We submit that any compromising data gained through surveillance for a different agreed purpose should also be inadmissible "in disciplinary or legal proceedings against an employee" unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence which has been obtained in this way.

2. To modify or add to the definitions section of the Act including:
 - a. Employee: to include labour hire employees to reflect the current definition of the employee as per s.3employer(c) of WSA.
 - b. Electronic Surveillance: insert a definition.
 - c. Amend Surveillance Information: to include all sources of information that employer could obtain whether direct or indirect.
 - d. Amend tracking surveillance definition
 - e. Disciplinary proceeding: restricted to an employee involved in an unlawful or criminal action and not be used for any other purpose including, but not limited to, performance.

2a.

The employer definition within s. 3 WSA has a definition identifying that an employer's responsibility extends to labour hire agency employees. This ought to be reciprocated within the definition of an employee to include labour hire and any other person operating at an employer's worksite.

2b.

The definitions within the Act currently include camera surveillance, computer surveillance, and tracking surveillance.

A further definition to be considered is electronic surveillance to capture all other forms of surveillance. **The proposed definition for electronic surveillance is: "any other forms of surveillance that has the ability to monitor, view or assess an employee without the manager being required to be present. This may include, but not restricted to, swipe cards, access cards, finger print scanning, mobile phone, scanning and any other devise."**

2c.

The source of obtaining surveillance information or data can present unfair opportunities to an employer if third parties provide surveillance information such as a video of a worker to the employer. For instance, a gas company, whose outdoor employees are in full view of the public, could receive a video clip or other information concerning the performance of its employee from the general public. The Gas Company could argue that it did not request the information but since it was given the information then it must act. Consequently, a company can indirectly encourage members of the public to become defacto company observers by reporting employees who do not provide exemplary service.

The following definition should be amended in the Act to read as follows:

"Surveillance Information: means any information or data obtained, recorded, monitored or observed as a consequence of surveillance of an employee sourced directly by the employer and the employer is excluded from using any

indirect surveillance information (for example unsolicited video etc) provided to the employer.”

2d.

The definition of tracking surveillance ought to be amended to capture the various technologies available that can record the movement of an employee.

The definition of “tracking surveillance” in section 3 of the Act states “surveillance by means of an electronic device the primary purpose of which is to monitor or record geographical location or movement (such as a Global Positioning System tracking device)”. An E-tag attached to a work vehicle does not appear to fall within this definition because the primary purpose of this device is to activate the payment of a toll fee. As a result, the 14 days notice and accompanying requirements contained in section 10 of the Act do not appear necessary in relation to an employer using an E-tag to monitor the location of their employees at work.

The AWU has encountered several instances whereby an employer has relied upon data gained from a toll charge or mobile phone location identified on a phone bill, to ascertain the location of a work vehicle at a particular point in time and to subsequently take disciplinary action against an employee.

The proposed amended definition of Tracking Surveillance: which is surveillance by means of an electronic device that can identify, monitor or record geographic location or movement (such as Global Positioning System tracking device, mobile phone call generation data, toll payment plazas).

2e.

A definition ought to be inserted to clarify by what disciplinary procedures are and to what extent that workplace surveillance can be used. **The proposed definition: “Disciplinary action means any action by the employer to give informal, formal warning notice or dismissal, due to an unlawful or criminal action of an employee. No other disciplinary actions or performance review can be warranted against an employee as a result of surveillance in the workplace.”**

3. The implantation of any overt surveillance must be conducted through a consultative process and any disputes arising to the merits, use or placement be allowed to be referred to the NSW Industrial Commission.

Even though the WSA has the intention of having discussions between employees and management regarding overt surveillance, in practice, it rarely happens, and if it does happen, then the processing is based on informing employees rather than having genuine discussions. Section 10 of WSA lists the requirements of notice; s10(4) identifies what must be in the notice; and other areas of the Act (such as s. 12(b)) infer that the employee is aware and understands the policy.

Ideally, the AWU believes any workplace that requires surveillance should have a workplace committee set up to develop the policy, monitor and provide an ongoing review to measure its purpose against outcomes.

The AWU proposes that the WSA be amended to set out a genuine consultation process that management must adhere to. The Act must outline the requirements of genuine consultation to include:

- Proposal given to workplace representatives and the union(s) on site;
- Genuine need is to be established by management as to why surveillance is required;
- Membership of the consultative committee to include workplace employee representatives from each area and at least one representative from each shift and employee representative from each of the labour hire agencies or contractors used at the premises.
- All suggestions to be genuinely explored, particularly in reference to the positioning and/or types of surveillance to be used; and,
- A review mechanism such as a committee established to ensure the aims are being met; any changes required; and, whether there is any further need for surveillance in the future.

If agreement cannot be reached at the workplace then the matter can be referred to the NSW Industrial Relations Commission for conciliation and if required, arbitration.

4. Expand the requirements of notice of surveillance required (s. 10) to include:
- a. New notice to be issued whenever a change to surveillance takes place.
 - b. Purpose of the surveillance is to be added to s10(4)
 - c. Review and reporting of surveillance outcomes is to be added to s10(4).
 - d. Amending 10(4b) to read location of surveillance devices.
 - e. Limiting to a specific maximum time period to 6 months in s.10(4e).

4a.

Section 10 of the WSA indicates that employees are to be given notice prior to the commencement of the surveillance. The information required to be given to employees is listed in s10(4). The Act does not require any further notifications to be given to employees if additional cameras (for example) are to be installed.

Section 10 ought to be amended that a new notice must be given on every occasion there is some change to the surveillance system at the workplace. This can also be done in conjunction with item 3 above, requiring that any proposed changes ought to progress after approval of a workplace committee.

4b.

S10(4) lists what must be included in a notice. To gain a better acceptance across the workforce, the notice needs to include the purpose of surveillance and what are the anticipated outcomes of the surveillance. Consequently, an amendment is required to the section to insert the purpose of the surveillance.

4c.

The notice given to employees through s.10(4) must also include when the surveillance is to be reviewed and the report dates where employees will receive information as to how the surveillance has gone compared to the stated goals. This places some transparency and accountability on management to provide progress reports to employees.

4d.

S.10(4b) creates ambiguity as it is similar to s.10(4a). How will surveillance be carried out is less specific as to the AWU preferred amendment of location of each surveillance device. It may also be beneficial to employees if they are given a map identifying the location of each surveillance device. The surveillance device ought to be overt so therefore it stands to reason that they are fully disclosed to all workers including labour hire employees.

4e.

The life span of a “notice” under s. 10(4e) of the Act allows for the ongoing surveillance of employees without any requirement for accountability or transparency.

The Act should be amended so that surveillance of employees on an ongoing basis is discouraged. Surveillance is invasive and should generally be minimised in an industrial relations context.

The AWU believes that the goal can be achieved if the Act is amended to state that a “notice” issued under section 10 of the Act will automatically lapse after 6 months. If an employer wishes to continue surveillance of employees on an ongoing basis they will need to re-issue the “notice” to employees after every 6 month period after the consultative committee has met and agreed to further extensions. This process will not prevent ongoing surveillance by employers but may reduce the amount of excessive and invasive workplace surveillance that currently exists. The process will also ensure that the use of surveillance is regularly brought to the attention of all affected employees.

5. Expand the requirements for notifying people as listed in s.11(b) to include signage next to cameras wherever they are installed.

S.11(b) of the Act requires signage to be clearly visible at the entrance of each workplace. The workplace may have several cameras situated throughout the various rooms. The AWU requests that this section be amended so that each camera has a sign attached next to it that it is a camera used for surveillance purposes. The overt nature of the surveillance should allow for signs to be placed next to each camera. Even though cameras are generally not hidden but it would be difficult for new employees or transient labour hire employees to know specifically where the cameras are located.

Many workplaces have restricted areas that require swipe entrance via doors. Each area may have cameras situated within the space. The Act is unclear as to each entrance needs to have a sign or whether the initial entrance to the site requires the sign. All employers believe the latter is the requirement.

6. Consultation to take place whenever additional cameras are to be installed or changes to the surveillance system are made.

As discussed in point 3 above, consultation is an important process in gaining workers acceptance to the introduction and use of surveillance cameras or other devices. Surveillance devices are to protect the employer against theft or criminal activity and not rating performance of an employee. Accordingly, once the initial surveillances devices have been installed, any further changes ought to go through the consultation process. There needs to be justification as to the changes and collaboration on the best means to achieve the outcomes desired.

The Act need to be amended that ongoing consultation is a requirement particularly if there are changes required to the surveillance system.

7. S.29(2)(d) to include registered industrial organisation representing employees for who can request surveillance records on behalf of the employee.

s. 29(2d) allows for an employee or their "Australian legal practitioner" to request information sourced by surveillance devices when being used for disciplinary purposes. Employees are generally not in a position, either financially or know of a legal practitioner that could help them within a short-time period. This section of the Act ought to be expanded to include union representation (registered industrial organisation of employees) particularly since it is a workplace issue. In the first instance, a union official and not a legal officer would be the first contact between the employee and employer regarding any incident.

8. Limiting the use of recorded surveillance by non-employer groups or associations to focus on their core issue and not to be used for employee performance or related disciplinary matter.

There are instances where non-employer agencies (or third parties) require surveillance to be undertaken of the employer premises. Examples include:

- NSW Game Council is currently seeking to have surveillance cameras placed in Forests NSW land to monitor feral animals. NSW Game Council is of the opinion that they do not have to inform Forests NSW management or employees as to where the cameras are to be located and as to where the images will be stored and who will have access to them. Discussions have recently started but there is no commitment by Forests NSW not to use the images for performance purposes.
- Content Delivery & Storage Association (CDSA) is the worldwide forum advocating the innovative and responsible delivery and storage of entertainment, software and information content. It is a global network of certified sites that are audited to industry standards in their preparedness in content protection and security. The licensees of the world's leading motion pictures, home video, music, software and games companies recognise and reward CDSA certified sites with their contracts to produce DVDs, CDs etc. Without accreditation the recorded media replication site will lose the contract to replicate. In NSW there are 4 large recorded media factories and these factories undergo an audit by CDSA which requires the placement of surveillance cameras throughout the factory. Consequently, there is no discussion on the placement of cameras and no involvement by employees.

If third parties are enforcing employers to have surveillance devices, then employees ought to have the opportunity to discuss and consult on the placement and more importantly, that these devices are for theft and criminal purposes and not to assess an employee's performance.

9. Restricting the use of surveillance by law enforcement agencies to criminal and/or unlawful actions rather than assessing the performance of employees within the law enforcement agencies.

Section 3 of the Act contains the definition of a “law enforcement agency”. This definition has important implications because a “law enforcement agency” can undertake covert surveillance of employees without having a Magistrate issue a covert surveillance authority (see section 21 of the Act).

The AWU has numerous members working for Forests NSW (which is part of the Department of Industry and Investment) and the National Parks and Wildlife Service (which is part of the Department of Environment, Climate Change and Water). Both of these public sector organisations have recently raised their status as a “law enforcement agency” during discussions about the use of surveillance in the workplace. It would appear that reliance is being placed upon the organisations falling within the scope of “any other authority or person responsible for the enforcement of the criminal laws of the Commonwealth or of the State”. AWU members have already been subjected to disciplinary action which has involved information gathered from workplace surveillance and further instances are likely to arise in the future.

We acknowledge that Forests NSW and the National Parks and Wildlife Service do undertake what could loosely be referred to as “policing work” in relation to land they manage. However, we question whether these organisations are sufficiently connected to the “enforcement of criminal laws” to justify activating an exemption from compliance with the covert surveillance requirements in the Act. We further question whether the legislation intended to allow organisations such as Forests NSW and the National Parks and Wildlife Service to have the capacity to conduct covert surveillance of their employees without having to first justify this action to a Magistrate.

We submit that this issue needs to be clarified so that public sector organisations and the unions that represent their employees have a clear understanding of their rights and obligations concerning the covert surveillance of employees in the workplace.

CONCLUSION

This submission by the AWU covers important changes that are required to the WSA so as to make it an effective, workable and transparent tool to be used by management and employees in the workplace. The above changes encourage building a relationship of trust between management and workers through a consultative mechanism.